Comfort Inn *and* Melissa C. Crowder. Case 11–CA–13443

February 14, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 7, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint in its entirety.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Rosetta Lane, Esq., for the General Counsel.
J. Gregory Mooney, Esq. (Collins, Crackel & Mooney), of Covington, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Covington, Virginia, on February 28, 1990, on an unfair labor practice charge filed on August 2, 1989, and a complaint issued on September 29, 1989, alleging that the Respondent violated Section 8(a)(1) of the Act by discharging Angela Anderson and Melissa Crowder because they engaged in protected concerted activity. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record, including my opportunity directly to observe the witnesses while testimony and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Virginia company, operates a motel in Covington, Virginia. In the course of that operation, during the past 12 months, a representative period, it received goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Virginia. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The Respondent's employment of housekeepers Angela Anderson and Melissa Crowder ended on July 14, 1989.[1] The complaint alleges that both were discharged. However, there is no testimony to that effect, and both admit to having quit their jobs. On this state of the record, the General Counsel contends that they were discharged constructively, having been forced to quit in consequence of their participation, with coworkers, in efforts to improve working conditions. The Respondent denies that either was subjected to any form of compulsion, and, in any event, argues that the terminations were unrelated to any protected activity.

B. *The Facts*

In late June, the Respondent's housekeeping unit expressed dissatisfaction with Betty Linton, their immediate supervisor, and her assistant, Patty Gaines. On June 29, all maids on duty, namely, Crowder, Anderson, Teresa Knick, Debbie Rice, and Glenda Hyler, requested a meeting, and did in fact meet with Gustav Asboth, the inn's general manager. Asboth expressed surprise at the maid's disenchantment, informing the group that he was unaware of any problems. In the course of the meeting, the employees expressed concern over the Respondent's practices in the area of sick leave, work scheduling, and granting days off, as well as the absence of predictable rules and policies, and inconsistent direction and harassment by Linton. Crowder testified, with corroboration by Anderson, that Asboth told them that their ''jobs would not be jeopardized because we were meeting with him.'' She described his posture as receptive and cooperative,[2] adding that Asboth stated that he was very pleased with the maids.[3] At the end of the meeting addressed the attendance issues, stating that he would attempt to work out a scheduling system with Linton. He also indicated that he would try to secure additional sick days, while suggesting that the housekeepers meet with Linton and Gaines.

On July 13, that meeting was held. Attendance was compulsory, and all maids attended, as did the entire management staff, including the wife of the owner, Mrs. Sankar. Asboth opened the meeting with a plea for harmony. It was Crowder's impression that ''Basically, . . . he wanted to try to get something accomplished at this meeting.''

Asboth credibly testified that, in his opening remarks, he laid down certain ground rules, stating that this would be an open forum, allowing dissatisfaction, both by supervision and employees, to be aired, with a view towards resolving the

[1] Except as otherwise indicated, all dates refer to 1989.

[2] Teresa Knick, who was employed by the Respondent for only 1 month, suggested otherwise. She claims that when she inquired as to what would happen if the meeting produced no solutions, Asboth replied, ''If you feel this way, you ought to find another job.'' Knick was an unimpressive witness, who would have been discredited in this instance even if her account were not refuted by Anderson and Crowder.

[3] Asboth credibly, without contradiction, testified that, in the course of this meeting, Melissa Crowder stated: ''If things don't go any better, I will quit.''

conflicts. As matters turned out, the meeting quickly degenerated into a cross-fire of recriminations. Linton apparently was less receptive to the employee initiative. She first stated that she had a hand full of notes as to what she would say at the meeting, but the notes were stolen. Moreover, Crowder, with corroboration from Teresa Knick and Anderson, testified that Linton slammed a stack of employment applications on the desk stating that if the maids did not want to work here, there were others she could call in. In fielding the complaints of several different maids, Linton, inter alia, pointed out that, contrary to their objections, Crowder had received numerous Fridays off, and that Anderson was awarded time off to attend family business. In addition, Linton registered a complaint that Crowder, Anderson, and Knick did not like to clean the rooms assigned to Myrt Robinson, a maid who was black.[4] Apparently, this reference evoked an internecine screaming match between the maids themselves, when Frances Graham accused Anderson of racial prejudice. Anderson became infuriated, denying Graham's assertion, but stating that Linton feared blacks.[5] Mrs. Sankar, at this juncture, appealed to Asboth to end the meeting. He did so, with the appeal: ''Well, let's just all go back as one big happy family and go back to work.''

Asboth personally the meeting as follows:

> My personal opinion was that it went better than my expectation. Much better in fact. I was very happy. There was a couple of sort of sad moments in there where people got personal. But otherwise, the meeting, I believe, went very well. Some perceived grievances were aired, and I might add, on both sides. The supervisors had as many grievances, I suppose, as the employees did. A lot of things were talked about at length and it was all agreed that there was going to be a new spirit of cooperation and, you know, ironing out differences. Well, I walked away from that meeting quite satisfied. In fact very happy about it. That is why I did make the statement . . . ''well, there is one big happy family.''

After the meeting, at Linton's invitation, Crowder went to review a record maintained by the former concerning the number of Fridays Crowder had been given off that year. In the process, she allegedly overheard Linton tell Frances Graham that she believed that Angela Anderson induced Bill Boguess, a maintenanceman, to steal Linton's notes.

When she arrived home that evening, Anderson, upset because of the meeting, telephoned Crowder. In contrast with Asboth's impression, they discussed their mutually held view that the meeting accomplished nothing and ''sounded like a bunch of squabbling women who hated each other.'' In Crowder's words:

> [T]here was a lot of hostility and bickering going on. It wasn't supposed to be that way in a business. In working conditions you shouldn't be harassed or you shouldn't have to come to work nervous. . . .

Anderson felt as if she had been ''picked on'' at the meeting,[6] a reaction exacerbated by Crowder who then told Anderson that she had overheard Linton implicate Anderson in the theft of Linton's notes. They discussed the fact that neither looked forward to reporting for work the next day.

Anderson then telephoned Emmett Boguess, the son of Bill Boguess, who also is married to Anderson's cousin. Emmett was also employed at the time by the Respondent as a maintenanceman. She asked if he knew that she and his father had been accused of stealing papers. Emmett Boguess denied knowledge and became upset. He relates that Anderson told him ''that she was quitting and that her and Melissa wouldn't be in to work the next day . . . [a]nd that she hadn't got to talk to Teresa Knick yet, that she thought she wouldn't going to be coming in either.''

According to Boguess, after Anderson's call, he telephoned Linton inquiring as to whether she had accused his father of stealing notes. Linton denied accusing any one in particular, stating that all she knew was that her papers had disappeared. Boguess then stated:

> Well, you had better be prepared to hire some new help in the morning because you've got two maids [Anderson and Crowder] for sure that is not coming in, and probably three [Knick]. But I know of two, for sure, that said they would not be there.

Meanwhile, Anderson called Teresa Knick. According to Knick, Anderson stated, ''She didn't know how she was going to be able to face work tomorrow, because she was just so upset.''

In the interim, Anderson drove to the home of Emmett Boguess in search of his father. Emmett Boguess testified that he informed Anderson that Linton had told him that she had accused no one of stealing the notes. From Emmett's house, and in his presence, Anderson once more called Crowder, and in the course of their conversation said, ''I feel like not going to work tomorrow.'' According to Boguess, after hanging up, Anderson told him that she was not going to work tomorrow as she was quitting,[7] that Crowder would not come in, and that she had to check on Knick.

Anderson then went home, again calling Crowder. She states that in this conversation, they ''agreed to go to work the next day, because if [they] didn't [they] would be playing right into their hands.'' Anderson also telephoned Knick, who agreed to meet Anderson and Crowder before work in

[4] I reject the General Counsel's characterization of Linton's complaint as a ''racial accusation.'' The three maids admittedly had balked at cleaning Robinson's rooms, on the asserted ground that they were dirty. I also find no basis for inferring, as suggested by the General Counsel, that Linton on raising this issue ''intended to create internal conflict among the housekeepers.'' Finally, Asboth, contrary to the General Counsel did not ''admit . . . that Linton's racial accusations resulted in the meeting becoming a chaotic shouting match among the housekeepers and between the housekeepers and Linton.'' This quotation from the General Counsel's brief contains three important inaccuracies. First, Asboth never acknowledged that ''racial accusations'' were involved. Second, he simply admitted, on cross-examination, that it was *possible* that Linton's reference to Robinson's room ''resulted in the maids being angry at one another.'' And, finally, there was no evidence that Linton was involved in the shouting match which ensued.

[5] Because Linton criticized, but never formally desciplined Robinson, Anderson, and Crowder held to the notion that Linton was afraid of and hence favored blacks.

[6] It is not entirely clear whether Anderson, in this respect, was reacting to the accusations by coworker, Frances Graham, or attempts by Linton to deflect her complaints, or both. It was my impression from all the testimony that the argument with Graham was particularly distressing to her.

[7] Myrt Robinson testified that on July 13, after the meeting, Anderson was upset and crying and said she was going to quit.

the parking lot the next morning so they could report together.

According to Linton about five maids were scheduled to work on July 14. Although she was scheduled to begin a 4-day holiday on July 14, Boguess' report required her presence at the inn that morning.

On July 14, Knick, Crowder, and Anderson met in the motel parking lot. They went to the laundry room where they clocked in and picked up their cleaning equipment and supplies. Linton, Gaines, and other maids were present as they arrived. Nothing was said and after clocking in at 8 a.m, Knick, Crowder, and Anderson left to attend their normal duties.

Earlier that morning, Asboth learned that Emmett Boguess had warned Linton that ''several of the maids told him that they will not come in.'' With Linton, he sought out Boguess,[8] who again confirmed Anderson's statements to this effect. When Asboth was advised by Linton that all the maids had reported, he instructed Linton as follows:

> I think the situation is out of control. I don't know what these girls are intending on doing, but I think you better put a stop to this kind of behavior. At least find out what is going on. . . . [I]f they are this disruptive, if that is the case where they were going to call in and threaten . . . quitting—and they changed their mind between that point of sending a message and then deciding on coming in the next morning, that is really unacceptable behavior.[9] And I recommended that she give them a reprimand. . . . I told her that if she is not satisfied with their version of the story, that she could just give them a five-day suspension.

In this respect, Linton's recollection bears greater kinship with that of Anderson and Crowder. For she claims that on reporting this development, Asboth stated: ''You talk to them and let's write them up for a five-day suspension and see what the problem is.'' Consistent with Linton's understanding, two identical reprimands were prepared before she met with the three maids.[10]

At 9:30 or 10 a.m., Linton called all three to meet with her and Gaines in one of the rooms. Linton said, ''I heard you weren't coming in to work today,''[11] inquiring as to why they had told Emmett Boguess that they were going to quit. They denied having done so. Linton asserts that she believed Boguess[12] and therefore requested that Crowder and Anderson sign reprimands, ''for five days off because you all were not coming in today.''[13] Crowder protested, ''You can't do that. You can't give somebody five days off just because they talked on the phone and said they weren't coming in to work today.'' At this point, Anderson and Crowder rose, announcing that they would not sign the papers, but that ''We are going to quit.'' They walked out, with Crowder telling Linton, ''she would hear from my lawyer and she could stick the job up her butt.''[14]

According to Asboth, he received a report from Linton that Anderson and Crowder were uncooperative and abusive, and that they refused to sign the reprimand, whereupon she decided to give them a 5-day suspension ''because of their general behavior.''[15] Anderson credibly testified that, when informed of the quit, he was ''sorry'' that the maids had reacted in this way. Believing that ''they are hot-headed,'' he attempted to correct the situation, approaching them at Anderson's car. Anderson accused him of not being much of a man because he allowed Frances Graham to curse her during the July 13 meeting. He had no response, but simply lowered his head to the ground. Asboth then discussed the quit with Crowder. According to Crowder, she told Asboth that they had no choice once given ''five days off because of a conversation we had on our phones at home.'' Crowder then charged that she and Anderson knew they had been disciplined because they ''wanted to have some things changed up there.'' According to Crowder, then Anderson joined in the conversation. Being upset and crying Anderson protested to Asboth that she had been accused of stealing and did not appreciate it. I believed Asboth's testimony that he confronted the alleged discriminatees, hoping to change their minds about quitting. His uncontradicted account of the exchange was as follows:

> As I was walking out of The Comfort Inn . . . I saw Ms. Anderson's car. Melissa was coming out of the building and at that point I attempted to talk to them, reason with them, cool them off. Explaining to them that the reprimand process is basically . . . an attempt at discipline with a positive side to it. That they should

[8] Boguess testified that when he reported for work, Anderson confronted him stating that he was in trouble because Linton told Asboth that he had cursed Linton out in their phone conversation of the night before. Boguess avers that when he asked Asboth about this at the above meeting, the latter denied this was so.

[9] Asboth appears to have been laboring under a state of confusion when he testified that he was unaware that the maids had reported for work when these instructions were issued to Linton. In this respect, it is noted that Patty Gaines testified that, on July 14, Asboth arrived at the inn at 9 a.m. and that Linton did not meet with him until then. Under all versions, Anderson and Crowder were already working at that time.

[10] R. Exhs. 1 and 2. The inscription on these documents was added in two stages, and not completed until after the supervisors actually met with Anderson and Crowder. Thus, prior to the disciplinary meeting, Gaines had drafted duplicate summations on each document, limited to the following:

> Told Emmett Boguess that she was quitting. He in turn called Betty and told her she would be 2 maids short on July 14, because they were quitting. This caused her to have to report to work on her day off. They did report for work.

After the meeting, Gaines supplemented the reprimand, adding the following: ''When confronted with this information, they walked off the job.'' The final version of the reprimands included no reference to a suspension.

[11] The reason for the inclusion of Knick is not entirely clear. Linton initially explained that Knick was included because Boguess suspected that she too might have intended not to report that morning. Later, however, when she was confronted with similarities in the cases of Knick and Crowder, Linton changed position, stating that Asboth had instructed her to include Knick ''because she had an attitude problem.'' Asboth, on the other hand, denied knowledge as to why Knick was included.

[12] Linton admitted that she was unaware that Boguess had talked to Crowder on the evening of July 13, or that Boguess had heard anything from anyone other than Anderson, who had telephoned Crowder in his presence.

[13] Gaines disagreed with Linton. Her version more closely corresponds with Asboth's understanding of what was to take place at the meeting. Thus, she related that Anderson and Crowder were told that if they signed the written warning in its initial form, ''that would have been the end of it. However, if they refused, they would get a five day suspension.''

[14] As Anderson and Crowder left, Knick started to follow, but Linton intervened telling Knick that this had nothing to do with her as ''there was nothing said about you [Knick] weren't coming to work.'' Knick therefore resumed her duties.

[15] Neither document states that the maids were uncooperative, abusive, or that they refused to sign any reprimand.

> really not see this in a negative light. And they were still quite hot. At that point I told them, ''Okay, you're so hot-headed now, so frustrated, why don't you go home, cool off and call Betty later?''

Linton confirmed that Asboth subsequently told her that ''both the girls are hot tempered, mad, [and] upset.'' Linton states that she was instructed, ''If they call you back and want their job back in a day or two . . . you talk to them and you all talk out your differences and let them come back . . . after the suspension was signed.'' There was no response.

C. *Concluding Findings*

The General Counsel contends that the action by Anderson and Crowder in voluntarily terminating their employment constituted a constructive discharge, violative of Section 8(a)(1) of the Act. In support, the General Counsel does not argue that the reprimand and/or suspension inherently created an employment situation so intolerable or impossible as to be incompatible with their continued employment. See, e.g., *Bennett Packaging Co.*, 285 NLRB 602, 607 (1987); accord: *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 890 (1984). Instead, the General Counsel relies on long-established, settled policy, to the effect that an employer is guilty of a constructive discharge when employees elect to quit after being offered a choice between the exercise of Section 7 rights and continued employment. *Atlas Mills, Inc.*, 3 NLRB 10, 17 (1937); *Block-Southland Sportswear*, 170 NLRB 936, 937–938 (1968).

The analysis begins with my endorsement of the General Counsel's view that at all times prior to their terminations, Anderson and Crowder were engaged in activity protected by Section 7 of the Act when they discussed with management, and as between themselves, their concerns and strategies for improving conditions of work. The Respondent, when alerted to the fact that they might absent themselves from work, elected to discipline them, and when they reported for work in timely fashion, but refused to acknowledge a reprimand, suspended them for 5 days.

There is no doubt that Anderson and Crowder remained within the protected process when they discussed the possible refusal to report for work.[16] Hence, they could not legitimately be disciplined on that ground.[17] However, the question here is whether, in such circumstances, the offended employees, having elected to quit, are to be treated as unfair labor practice strikers, with no right of reinstatement or backpay until rejection of their offer to return to work, or as dischargees, whose remedial rights inure from the date on which they voluntarily terminated.

Any delimitation between these alternatives must take heed of the fact that ''[t]he Board has long held that there is no constructive discharge when an employee quits in protest against unfair labor practices.'' *Kogy's, Inc.*, 272 NLRB 202 (1984). In other words, the remedial processes under the Act will view such employees as having no greater rights than strikers in the ''situation in which an employer's unfair labor practices are designed merely to thwart its employees' union activity *while retaining them as employees*.'' See *Block-Southland Sportswear*, supra, 170 NLRB at 938. The General Counsel argues that this was not the case here, because the continued employment of Anderson and Crowder was conditioned on their giving up statutory rights. This is a view of the record which borders on frivolity. There is absolutely no evidence suggesting that this was the case. Neither Anderson nor Crowder testified that they were ever offered such an ultimatum, or understood that the Respondent would not retain them if they continued their efforts in quest of improved working conditions. Moreover, the record fails to disclose that either was ever told, assumed, or had reason to believe that their employment was contingent on their acknowledgement and acceptance of the reprimand or 5-day suspension,[18] or their agreement to forbear from challenging these actions before the National labor Relations Board.

In these circumstances, it is concluded that Anderson and Crowder voluntarily terminated their employment under conditions which were not subject to remedy under the Act. The 8(a)(1) allegation of the complaint shall be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[16] The Respondent argues to the contrary. However, deliberations by Anderson and Crowder as to whether they would report to work stemmed from the July 13 meeting and related to a means for relieving their shared frustration with the lack of progress made at that time. In this light, their discussion bore a sufficient nexus to ''group goals'' to itself fall within the protective mantle of Sec. 7 of the Act. *Cox Enterprises*, 264 NLRB 878, 879 (1982).

[17] This disciplinary response is not mentioned in the complaint. Yet, the General Counsel argues in her posthearing brief that ''Respondent violated Section 8(a)(1) of the Act when it *attempted to discipline* and thereby constructively discharged Crowder and Anderson because of their protected conduct [emphasis added].'' Obviously, the discipline, left unmentioned by the complaint, has now become the central predicate for the plea that these employees were victimized by a ''constructive discharge,'' itself unalleged. Indeed, the General Counsel has recognized the importance of this aspect of her case by urging the undersigned ''to affirmatively expunge the discipline from the personnel records of Crowder and Anderson.'' These are not the only unalleged matters that are deemed by the General Counsel to be significant to her discrimination theory. Thus, she argues that Linton used employment applications at the July 13 meeting ''as a graphic demonstration of the availability of replacements . . . intended to curtail any future complaints and concerted activity by the housekeepers.'' Here again, the complaint fails to address an important incident. Like it or not, as administrative law judges we all must accept the fact that, in consequence of Board procedural practices, the General Counsel is seldom faulted for a lack of precision in drafting complaints. While this policy has its rightful applications, here, we have an uncomplicated and straightforward case, under an extant complaint which defines a single unfair labor practice, itself, in misleading terms. Yet, the omissions and variances are pervasive to the point of embarrassment, affecting each and every actual and potential issue. To make matters worse, the General Counsel's three witnesses were privy to each incident, and hence the events were known, or should have been known prior to issuance of the complaint, and during the 5 months that it lay idle prior to hearing. In this light, I refuse to dismiss these discrepancies lightly as simple oversight or an act of carelessness. In these circumstances, to assist the prosecutorial function by participation in nebulous determinations of when an issue is and when it is not fully litigated, and to cull the record independently in furtherance of that process, would reward a wrong under conditions fostering either indifference to the pleading process or the type of abuse suggested in this instance.

[18] The General Counsel argues that Respondent's position after the quit demonstrates its intention to require Anderson and Crowder to give up statutory rights as a condition for continued employment. It is true that Asboth was receptive to the rehire, if pursued by either, provided they signed the letter of reprimand and agree to the 5-day reprimand. Firstly, Respondent's position after the quit would not necessarily be indicative of its earlier intention. The pique manifested by the employees might well have induced management to a hardened stance. More importantly, neither Anderson nor Crowder testified that such a condition was communicated to them either before or after the quits, and hence whatever the Respondent's intent, it could not have been among the considerations prompting their action during either timeframe.

2. The Respondent did not discharge Angela Anderson and Melissa Crowder on July 14, 1989, in violation of Section 8(a)(1) of the Act, because they engaged in concerted activity protected by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

It is hereby ordered that the complaint be dismissed in its entirety.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.